

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:8:LN:2:GL-128927-02
WBDouglass

date: JUL 24 2002

to: SB/SE Compliance, Long Beach
Attention: Lovella Cousins-Harris, R.O. 3403-4211

from: WILLIS B. DOUGLASS
Attorney (SBSE)

subject: Reinstatement of Pre-RRA 1998 Levy
Taxpayer: [REDACTED] SSN [REDACTED]

This memorandum responds to your request for assistance dated May 23, 2002. This memorandum should not be cited as precedent.

ISSUES

1. Can the County [REDACTED] resume payments on a Form 668-W wage levy that was served on the County in [REDACTED] to collect delinquent tax liabilities of the taxpayer?

2. If payments under the Form 668-W wage levy are to be resumed, must the IRS first issue a Letter 1058 (collection due process notice) to the taxpayer?

3. Should a suit under I.R.C. § 6332 for failure to honor levy be filed against the County [REDACTED]?

4. Do levies or garnishments against the taxpayer's salary served subsequent to the IRS's continuous wage levy have priority over the IRS's levy due to the fact that the County [REDACTED] ceased payments to the IRS in [REDACTED] of [REDACTED]?

CONCLUSIONS

1. Yes. The continuous wage levy is still in effect, and the County [REDACTED] should resume payments thereunder.

2. No. The regulations under I.R.C. § 6330 are clear that continuous levies which were in effect before the effective date of I.R.C. § 6330 are not required to be re-issued under collection due process procedures. However, if it is desired to file a notice of federal tax lien, collection due process procedures will apply.

3. No. We agree that the County [REDACTED] is subject to liability under I.R.C. § 6332. However, for reasons set forth below, we do not recommend that a suit for failure to honor levy be filed against the County.

4. No. The IRS's levy has priority over all competing levies and garnishments served since [REDACTED] unless the competing levies or garnishments are given special priority by the Internal Revenue Code.

FACTS

[REDACTED], the taxpayer, owes personal income taxes for [REDACTED], [REDACTED], and [REDACTED]. As of [REDACTED], his liability was \$[REDACTED]. On that date, a Form 668-W wage levy ("the Levy") was served on the taxpayer's employer, the County [REDACTED] ("the County"). Between [REDACTED] and [REDACTED], the County paid \$[REDACTED] to the IRS in honor of the Levy. At that point, the payments stopped. Later, it was explained that the County's automated payroll system cannot handle garnishments in excess of five digits. Therefore, when the total amount paid to the IRS reached \$[REDACTED], the system ceased automatic payment of the Levy. The County Auditor's office did not monitor the automated payroll system, and the IRS has taken no action, until now, to reinstate the Levy.

The County has informed the IRS that it is willing to immediately begin withholding funds from the taxpayer's salary in honor of the Levy. However, the County has also informed the IRS that the taxpayer's wages are now subject to other garnishments and levies which have been served on the County since the County stopped making payments to the IRS.

Because the Levy was served in [REDACTED], the taxpayer has never been given a Letter 1058 (collection due process notice). You have asked whether the County may recommence payments to the IRS without violating the taxpayer's rights under the collection due process statutes that became effective after the Levy was served.

You have also noted that the filing of a notice of federal tax lien has been requested, but that no lien has yet been filed.

ANALYSIS

A. The Authority of the IRS to Levy.

The IRS has the right to enforce payment of delinquent tax assessments through levy on a delinquent taxpayer's property or rights to property. I.R.C. § 6331(a). The Internal Revenue Code

provides for two distinct types of levies. In general, a levy extends only to property possessed and obligations existing at the time that the levy is served. I.R.C. § 6331(b). The continuous wage levy provisions of I.R.C. § 6331(e) are an exception to the procedure provided by I.R.C. § 6331(b)¹. Subsection (e) provides that "[t]he effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under [I.R.C.] § 6343."

The conditions under which a levy, including a continuous wage levy, will be released are set forth in I.R.C. § 6343. Expiration of the statute of limitations on collections is the only time-related condition for release contained in I.R.C. § 6343. I.R.C. § 6343(a)(1)(A).

B. The Effect of the Addition of I.R.C. § 6330 to the Internal Revenue Code.

The IRS's collection procedures were substantially amended by the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 ("RRA 98"), which added § 6330 to the Internal Revenue Code. This statute applies to levies served on or after January 19, 1999. Under I.R.C. § 6330, respondent is required to notify a taxpayer in writing at the taxpayer's last known address at least thirty days prior to a proposed levy so that the taxpayer may request a hearing before the Office of Appeals to challenge the proposed collection action. I.R.C. § 6330(a)(2)(C) and (3)(B).

Nothing in the Internal Revenue Code directly addresses the issue of the effect of the enactment of I.R.C. § 6330 on continuous wage levies which were served prior to January 19, 1999, but which were still in effect on and after that date. However, the regulations under I.R.C. § 6330 provide as follows:

Example 1. Prior to January 19, 1999, the IRS issues a continuous levy on a taxpayer's wages The IRS is not required to release [the] levy on or after January 19, 1999, until the requirements of [I.R.C.] § 6343(a)(1) are met. The taxpayer is not entitled to a CDP Notice or a CDP hearing under [I.R.C.] § 6330 with respect to [the] levy

¹The continuous levy provisions of I.R.C. § 6331(h) also constitute an exception to the rule of I.R.C. § 6331(b). However, subsection (h) does not apply to this case.

because [the] levy action [was] initiated prior to January 19, 1999.

Treas. Reg. § 301.6330-1(a) Example 1.

The above rule does not apply to the filing of a notice of federal tax lien against the taxpayer. Since the filing of a notice of federal tax lien would be a new collection action commenced after January 19, 1999, the taxpayer would be entitled under I.R.C. § 6320 to notice and a collection due process hearing.

C. Effects of a Failure by the Levied Party to Honor the Levy.

When served with a levy, a levied party must turn over to the IRS any non-exempt property in his possession belonging to the delinquent taxpayer named in the levy:

Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, on demand of the secretary, surrender such property or rights (or discharge such obligation) to the secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

I.R.C. § 6332(a).

In applying I.R.C. §§ 6331 and 6332, the United States Supreme Court has noted that there are only two defenses to the validity of a levy: (1) that the levied party is not in possession of, or obligated with respect to, property of the taxpayer, or (2) that the property is subject to prior judicial attachment. United States v. National Bank of Commerce, 472 U.S. 713, 105 S.Ct. 2919 (1985). In National Bank of Commerce, the bank on whom the levy was served held an account under the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." Only Roy Reeves owed taxes; there were no unpaid assessments against Ruby Reeves or Neva R. Reeves. It was unclear who owned the account and in what proportions. The bank objected to the levy, claiming that they should not be required to honor it until it was clear whether the money in the levied account belonged to the taxpayer or to one of the other two persons whose names were on the account. The Supreme Court held that the taxpayer's unrestricted right of withdrawal of the funds in the account was a property right held by the taxpayer sufficient to support the government's right to levy.

D. Conclusions and Recommendations for This Case.

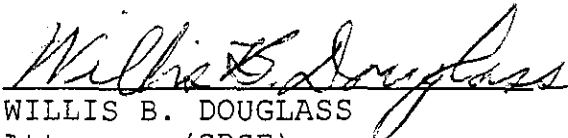
We have seen no reason to believe that the Levy was not properly served. As noted above, a Form 668-W wage levy remains in continuous effect "from the date such levy is first made until such levy is released under [I.R.C. §] 6343." This Levy has never been released under I.R.C. § 6343. Therefore, it remains in effect. The fact that the Levy has not been honored since 1999 makes no difference in the applicability of I.R.C. §§ 6331 and 6343.

Since the Levy is still in effect, it follows that, under Treas. Reg. § 301.6330-1(a) Example 1, quoted above, the taxpayer is not entitled to collection due process rights before the County recommences honoring the Levy. However, as noted above, the taxpayer would be entitled to a collection due process hearing if the IRS files a notice of federal tax lien against him.

In your transmittal you also noted the possibility of filing suit against the County under I.R.C. § 6332 for failure to honor levy. We believe that the County has technically failed to honor the Levy from and after [REDACTED] of [REDACTED]. I.R.C. § 6332 does apply to the facts of this case as presented. However, we agree with and support your stated inclination not to pursue a suit against the County. Your transmittal indicates that the County's failure to honor the Levy was not intentional. It further appears that if the IRS had called the attention of the County to the fact that Levy payments had ceased, the County would have recommenced sending payments to the IRS. A suit against a governmental entity such as the County, even if successful, merely transfers money from one tax-supported entity to another. Instead of going forward with a lawsuit against the County under I.R.C. § 6332, we recommend that you accept the County's current offer to immediately recommence payments to the IRS under the Levy.

In your transmittal you noted that the County has informed you that subsequent to the time that the County ceased payments to the IRS under the Levy, other creditors of the taxpayer have filed garnishments and levies with the County. You have not provided us with any specific facts or details regarding these competing claims. Therefore, we do not know whether any of these competing levies or garnishments are entitled to any kind of special priority under the Internal Revenue Code. For purposes of this memorandum, we will assume that no such special priorities exist. If this is not the case, please so inform us and we will revise this memorandum accordingly. Since we have determined that the Levy is still in effect, it follows that the Levy has priority over any competing levy or garnishment served on the County after [REDACTED], the effective date of the Levy.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.


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cc:

Area 14 Technical Support
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